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In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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The Secretary of Health and Human Services disallowed certain expenses incurred by respondent during the years 1978-1982, which respondent claimed were reimbursable under the Medicaid program. Respondent sought judicial review of that decision in the United States District Court for the District of Massachusetts, which assumed jurisdiction over the case. On appeal, the court of appeals reached two important jurisdictional conclusions: (1) that the district court lacked jurisdiction to "consider the claim for money past due" (Pet. App. 5a); and (2) that the district court nevertheless had jurisdiction to grant declaratory and injunctive relief "limited to * * * prospective relief" (*id.* at 7a). We agree with the first of those two holdings but have challenged the second in our petition.[1] Respondent disagrees with the first holding and makes no attempt to defend the second. Respondent nevertheless urges this

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[1] We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1). That fact was inadvertently omitted from the "jurisdiction" section of our petition.

Court to deny certiorari. We submit that the Court should, instead, grant both our petition and respondent's cross-petition (No. 87-929). We respond below to the reasons suggested by respondent for denying certiorari. We respond in a separate memorandum, filed today, to respondent's cross-petition.

1. Our petition challenges the court of appeals' decision splitting this case into two causes of action, one within the exclusive jurisdiction of the United States Claims Court under the Tucker Act, 28 U.S.C. 1491, and one within the jurisdiction of the district court under 28 U.S.C. 1331. Respondent makes no attempt to argue that this division of the case was proper. Rather, respondent contends that the entire case belongs in the district court (see Br. in Opp. 8-18; 87-929 Cross-Pet. 9-13). Respondent therefore appears to suggest that, because the court of appeals should have affirmed the district court's jurisdiction over the *entire* case, this Court should not review a judgment upholding the district court's jurisdiction over *part* of the case.

But respondent's position that the district court had jurisdiction over the entire case is hardly so plainly correct that this Court should ignore the serious claim-splitting issue raised by our petition. If (as we contend and as the court of appeals held) at least part of this lawsuit was not cognizable in district court, then—as we showed in our petition—there is a sharp split in the circuits as to whether it is permissible to divide the case into two actions, as opposed to requiring that the entire case proceed in the Claims Court under the Tucker Act. Thus, unless the Court is prepared to agree with respondents' view of the jurisdictional questions presented without further briefing and argument, a grant of both our petition and respondent's cross-petition is the appropriate course.

2. Respondent does not seriously contest our assertion that there is a conflict in the circuits on the claim-splitting

issue raised by our petition. Rather, respondent asserts (Br. in Opp. 15 & n.3) that the conflict is unworthy of resolution by this Court because none of the cases we cite as being in conflict with the decision below is a grant disallowance case. But the fact that the present case involves a grant disallowance rather than some other underlying dispute has no bearing on the claim-splitting question. It is, at most, relevant only to the question raised by the cross-petition. If (as we contend and the court of appeals held) respondent's attempt to recover past-due money is cognizable only under the Tucker Act in the Claims Court, then there is nothing special about grant disallowance cases that would affect the proper analysis of whether that part of the lawsuit can be divorced from the "prospective" part of the lawsuit. Indeed, both of the courts of appeals that have allowed claim splitting in the context of review of Medicaid disallowance decisions have recognized that their reasoning was in conflict with the reasoning of some of the cases involving different underlying claims that we have cited in our petition. See Pet. App. 6a n.1; *Minnesota ex rel. Noot* v. *Heckler*, 718 F.2d 852, 858 n.11 (8th Cir. 1983).

3. Respondent accurately notes (Br. in Opp. 6-7) that, at an early stage of this litigation, the Secretary chose as a matter of policy not to contest the district court's jurisdiction. It is also true that there were other cases in which the jurisdictional arguments we now make could have been made but were not made. See, *e.g.*, *Connecticut* v. *Schweiker*, 557 F. Supp. 1077 (D. Conn. 1983), rev'd, 731 F.2d 1052 (2d Cir. 1984), aff'd *sub nom. Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524 (1985); see also *New Jersey* v. *Department of Health & Human Services*, 670 F.2d 1300, 1304 n.8 (3d Cir. 1982). These facts do not mean, however, as respondent contends, that the Secretary's "current position is not so ob-

vious or pressing as to require immediate attention" (Br. in Opp. 19 n.4).

Although the correctness of our position is of course not "obvious," that is hardly a reason for this Court to deny review. This Court sits to resolve difficult and unsettled questions of law, not questions whose resolution is "obvious." And the issues in this case—both those raised in our petition and those raised in the cross-petition—are difficult and unsettled, as is demonstrated by the circuit splits discussed in our petition and in our memorandum in response to the cross-petition. Those circuit splits further demonstrate that there is a pressing need for resolution of the issues in this case.

If respondent is suggesting that review is inappropriate merely because the government's position on those issues has changed over time, then we disagree. As an initial matter, the change that has taken place in the government's position has to do with whether the Claims Court or the district court is the correct forum for the resolution of grant disallowance cases in their entirety—the issue raised by the cross-petition. The government has never agreed with the position of the court of appeals in this case that such cases should be bifurcated between the district court and the Claims Court. More fundamentally, the issue is one of *jurisdiction,* and it is the correctness or incorrectness of our position—not the consistency with which that position has been asserted in the past—that must govern. Accordingly, the court of appeals quite properly inquired into the jurisdiction of the district court,[2] even though no objection had been pursued in the district court. The court of appeals resolved the jurisdictional questions, agreeing with the government in part and with respondent in part. Both aspects of the court's decision stand as important precedents, and are in conflict with the decisions of other

[2] See Fed. R. Civ. P. 12(h)(3); *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982).

courts of appeals. Thus, review by this Court is fully appropriate.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

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